IN THE SUPREME COURT OF THE UNITED STATES

Office - Supreme Court, U. S.
FILED
FEB 27 1956
HAROLD B. WILLEY, Clerk

ERNEST M. PAESEN

Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, BERKELEY YOUNG MEN'S CHRISTIAN ASSOCIATION, STATE COMPENSATION INSURANCE FUND, and STATE OF CALIFORNIA (SUBSEQUENT INJURIES FUND),

Respondents.

1st No. 16789

No. 591 Misc.

PETITION FOR WRIT OF REVIEW

ERNEST M. PAESEN
1514 OXNARD STREET
BERKELEY 3, CALIFORNIA
Phone: THornwall 8-0647

IN PRO. PER.

TO THE HONORABLE PRESIDING JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner above named respectfully prays this Court by this, his verified Petition for Writ of Review, to hear and determine the lawfulness of an award for compensation by the Industrial Accident Commission of the State of California, and upheld and affirmed by the District Court of Appeal of the State of California, First Appellate District, Division One, and Petition for Hearing before the Supreme Court of the State of California also being denied. In support thereof your Petioner respectfully sets forth and alleges the following facts and reasons for said writ:

Before I state my case, I would like to call to the attention of the Court your Petitioner's immediate circumstances.

First, your Petitioner is unable to cope with the technicalities and regulations involved in filing this Petition. He is not an attorney and must therefore feel his way through the maze of red tape in hopes

that he will not be refused justice because he does not know the law. It greatly humbles your Petitioner therefore to make this relatively unimportant and insignificant appeal to the Supreme Court of the Land which has so many other and more important duties. It is therefore the earnest hope of the Petitioner that his Petition will at least be read or perused by one of the honorable justices before it is rejected because of its crudities.

Because your Petitioner feels so sincerely and is so convinced in the validity of his cause, he cannot conscientiously abandon his cause without voicing his protest to the injustice which has been done him in best way he knows how. It is therefore earnestly hoped that the Court will not consider this appeal an affront or presumption on the part of the Petitioner.

It is impossible for Your Petitioner to conform to all the details involved in filing this Petition, but if the Court sees fit to reject it on these grounds, your Petioner will humbly submit.

Second, your Petitioner is not financially prepared or financially capable of carrying his case through the Supreme Court. A person, in defending himself, is assigned a public defender. But a person against whom an injustice has been committed, must look to his own resources if the case is of a civil nature, though the injustice be grave. If one is incapable of resources, he must submit. To the one, is denied the wherewithal to obtain justice, and to the other, there is no need of defence.

Though it appears to the Petitioner that this might be the case, he has faith that this is not entirely so; that even though (in spite of your Petitioner's belief to the contrary) this Court may decide against him, his cause shall at least receive some official consideration.

It might be argued that the Petitioner could indeed have legal counsel, because the State law provides that attorney's fees shall be taken only from compensation awards, but where the award is unreasonably low because of illegal and inaccurate computations, there is very little left with which to retain counsel. An attorney cannot be expected to work for nothing. Your Petitioner did at the very first have an attorney, but because counsel did not know what might be the outcome of appealing this case to the courts, he requested to be relieved of this responsibility for he might have to go to all the trouble and spend much time taking this case through the courts without further remuneration. Thus your Petitioner has had to bear the burden of pleading his cause in pro. per.

If however, this Court sees fit that your Petitioner shall not be allowed to further prosecute his case because of financial inability, he will humbly submit to even this. Your Petitioner is not pleading for a favorable decision on this basis, but he is pleading that his case be allowed to proceed and to be heard on its merits regardless of these other regrettable circumstances.

Third, your Petitioner has available only thirty copies of the exhibit (the exhibit being his Petition for Hearing addressed to the Supreme Court of the State of California) which to send to the Supreme Court without going to a great deal of further expense. This Petition was filed in San Francisco, California, on December 14, 1955. The order

denying the hearing was filed December 23, 1955.

The Opinion and Decision of the Appellate Court, 1st District, Division One, may be found in the Advance California Appellate Reports, San Francisco, November 25, 1955, p. 971 (cited 136 A. C. A. No. 6, p. 971).

The State law pertaining to the matter on appeal is cited on pages 6 and 7 of the Petition for Hearing in the Supreme Court of the State of California which is attached hereto as an exhibit.

The charges are essentially the same.

First, the law was improperly interpreted, illegally applied in a discriminatory manner. (Before continuing, it might be well to first refer to the exhibit so as to get the background in mind.)

It is further pointed out that the preponderance of previous cases have been decided in such a way as to favor the Petitioner, even when it was much less so warranted. But the present decision of the Court rests primarily on only two cases. These are both referred to in the exhibit. In both these cases the employees had been working only from three to six days before the injury. They were both receiving pension. There was no evidence of a previous continuity of employment, and both were obviously not dependent on employment for a livelihood. Is it not a travesty of justice to compare the circumstances of these two cases to that of your Petitioner? Your Petitioner was a student, regularly working when not in school, even working while attending classes.

Further, an engineer having finished school working even less time that the Petitioner, would have received maximum compensation. His compensation would have been computed at the wages he was earning at the time of injury. But the Petitioner's earnings were not computed on the basis of the wages he was earning at the time of his injury. Furthermore, the law clearly and unequivocally states that if an employee's earnings cannot be computed by any other means, they must be computed at 95% of that sum which reasonably represents his average earning capacity at the time of injury.

The Supreme Court has power to interfere where a law is interpreted in a manner diametrically opposed to what a law clearly and unequivocally states, especially when this interpretation is used by the agencies and institutions of a state to deny one of its citizens that which is rightly his. It is only reasonable that this Court have the power to enforce the laws of a state legislature in behalf of a state citizen, if the agencies of the state refuse to do so.

It is clearly within the power of the Supreme Court to prohibit so construing a state law, if no reasonable man could come to the same conclusion.

In voicing these opinions, your Petitioner wants to make it clear that he is casting no aspersions on the characters of any who have handled his case.

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Your Petitioner also reiterates that he was not given a fair hearing by the referee trying his case, and that the Court allowed the unreasonably low Award affirmed in spite of the unsubstantiated presumptions of the referee hearing his case. This is pointed out in the attached Petition. The Appellate Court ignores the charge altogether. It merely refers back to the transcript and says according to the evidence taken, the Petitioner has no ground of complaint, even though the Hearing referee has no substantiating evidence for that on which he based his decision. The Appellate Court has taken the attitude, "Since evidence as to certain vital matters are lacking, the referee was warranted in drawing his own conclusions. Even in his arguments before the Appellate Court, the attorney for the Respondent Accident Commission conceded that the Petitioner might be correct in the Findings of Fact which the Petitioner alleged to be unfounded, and that the Respondent Commission would not insist on those matters.

It is true that your Petitioner was represented by counsel at the Hearing when the original evidence was taken, but let it be noted that the Petitioner had only seen his attorney for about five minutes before the date of the Hearing; that while the hearing was some sixteen months after his injury, the Petitioner spent about thirteen months away from the area of proceedings in convalescence.

When your Petitioner appeared at his hearing, he thought he would have to give information on only those matters concerning his injury and matters concerning earnings and employment on the job at which he was working when injured. When the referee asked for information regarding date of leaving school and other employment and earnings, your Petitioner could not give exact information. Some of this information the insurance attorney proffered, and the Petitioner assuming that this information should certainly be correct, assented.

Even though, upon appealing to the State Supreme Court, when these matters were again contended, and the Petitioner filed proof of his allegations, a hearing was denied without giving any reason.

Neither the Court, nor the Accident Commission has shown that the allegations and evidence brought forth by the Petitioner are in error. They simply ignored it, and insisted that the erroneous Findings of Fact (which were obtained at the Petitioner's unfair and one-sided Hearing. I say one-sided because the Petitioner relied on his counsel to have all the necessary facts, and to know and foresee any circumstances which might arise. The Petitioner was completely unprepared to give information concerning dates, earnings, and employment having nothing to do with the job on which he was injured. He did not know it would be required of him. The Petitioner did not realize the importance of this impertinent information. But the referee did not inform the Petitioner of the importance of this information at the Hearing. He should have insisted on correct information if this impertinent information must be used. Instead, the referee allowed uncertainties to be entered as Findings of Fact.

After the Award and Findings of Fact were issued by the Industrial Accident Commission on March 25, 1954, it was too late for the Petitioner to insist that these uncertainties be corrected.

From this point on, the Petitioner was on his own. He prepared

and filed a Petition for Reconsideration. After the Petition was denied, his counsel officially withdrew as attorney of record. The attorney did not have time to prepare the Petition for reconsideration, so the Petitioner had to prepare and file it himself, even though he had an attorney of record.

Your Petitioner being legally blind, was thus forced to try to acquaint himself with the law, precedents, and the many other complex legal technicalities and procedures. His financial resources were and are very limited. What was he to do, but carry on as best he could?

Your Petitioner does not ask for pity, but he does ask that his Petition be filed and considered in spite of its insufficiencies. This is no more than fair and just. Your Petitioner is weary of this case, and has been many times on the verge of dropping it because of his limitations, but he could not conscientiously do this because he is firmly convinced of his cause. The decision in this case will affect future decisions, and therefore your Petitioner feels it his patriotic duty to plead for that which he feels is just and right, even though the Petitioner feels that he can but inadequately express that which he clearly sees to be right.

It is the belief of the Petitioner that the Courts did not understand his case, otherwise it is unthinkable that they would have let this unreasonably low award stand, which was based on erroneous assumptions, incorrect computations, unfair Hearing, and an impossible interpretation of the law.

For this reason your Petitioner here suggests that the Industrial Accident Commission concur in its answer to this Petition, and that the Commission suggest to the Supreme Court that the decision of the Courts be annulled in order that the Award be raised to its rightful amount.

The Petitioner also questions the right of a state to set one man up to be both jury and judge at a hearing where evidence is taken, where the decision will vitally affect a party adversely affected for the rest of his life. It seems reasonable that there should be some sort of jury provision.

WHEREFORE, your Petitioner prays:

That the Supreme Court of the United States take such action as is necessary to correct this injustice.

Signature of Petitioner

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STATE OF _____)
) ss
COUNTY OF _____)

_____, being duly sworn, deposes and says:

That he is the Petitioner in the above entitled matter; that he has read the foregoing Petition and knows the contents thereof; that the same is true of his own knowledge except as to matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

_____
Petitioner

Subscribed and affirmed before me this_____

day of_____, 19_____

_____
Notary Public in and for the

County of_____

State of_____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ERNEST M. FRIESEN, Petitioner, vs. INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, BERKELEY YOUNG MEN'S CHRISTIAN ASSOCIATION, STATE COMPENSATION INSURANCE FUND, and STATE OF CALIFORNIA (SUBSEQUENT INJURIES FUND), Respondents.	No. 16789

PETITION FOR HEARING

ERNEST M. FRIESEN
1514 GRANT STREET
BERKELEY 3, CALIFORNIA

WITHOUT ATTORNEY

TO THE HONORABLE PRESIDING JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner above named respectfully prays this Court by this, its verified Petition for a Hearing, to hear and determine the lawfulness of an award for compensation made by the Industrial Accident Commission of the State of California, and upheld and affirmed by the District Court of Appeal of the State of California, First Appellate District, Division One, and in support thereof your Petitioner respectfully sets forth and alleges the following facts and reasons for said Hearing:

Your Petitioner respectfully submits that the Court should have distinguished his case from the case of West v. IAC, 79 Cal. App. 2d 711; that it is possible to use subdivisions a, c or d of section 4453 of the Labor Code to compute Petitioner's disability payments at maximum; that subdivision d was allegedly used, but in doing so, his earning history was the only factor taken into consideration contrary to subdivision d; and that the Petitioner was denied his right of presenting substantiating or accurate evidence at his hearing before the Industrial Accident Commission which is contrary to one of the basic duties of the Commission, and that the Court used the erroneous presumptions and

unsubstantiated evidence of the Commission in arriving at its opinion.

In the case of West v. IAC, 79 Cal. App. 2d 711, the court decided that earning capacity is a touchstone for average earnings in California, and that earning capacity is composed of three factors: (1) ability, (2) willingness, and (3) opportunity to work. Now, there have been no objections by any of the adversely affected parties that your Petitioner had both the ability and willingness to work. This is substantiated by a statement of the referee in the order denying Petition for Reconsideration: "I believe that though the employee may have had the capacity to earn more money and also the willingness to earn more money, he lacked the opportunity to do so...."

The point of contention then lies in the question whether or not the employee had the opportunity to work. First and most obvious, it is necessary to see what is meant by "opportunity to work." Since the decisions of both the Commission and the Court rest on the West Case just referred to, let us see what "opportunity to work" meant in this case:

In this case West was only employed 6 days prior to her injury, working as a practical nurse. It was noted that she was a willing seeker after compensation income, in that her back was a recurrent source of compensation. According to her own testimony she had no capacity to work, and was at the time of her employment still on county relief. There was nothing in her testimony regarding her opportunity to work. As to her willingness, she said she worked when she could. First, it is evident that a person unwilling to work might fail to see, or even pass up opportunities. It is also clear that a person without ability to work does not have opportunity to work. In this sense then, West lacked opportunity.

The first factor then, in considering opportunity to work is contingent on ability and willingness. West lacked the ability, and it can therefore be said that she lacked opportunity. It has been previously shown that the Petitioner had both ability and willingness, and therefore opportunity in this respect.

The second factor involved in opportunity to work is the actual presentation of an opportunity to take a job. Where a person is both willing and able to work, there must first be an opening. Your Petitioner presented sworn testimony to the fact that he did have such opportunity to work immediately after leaving college on February 18, 1953. However, the Petitioner, because of his religious scruples, could not tell an employer that he was available for a permanent position. The Petitioner was told by several prospective employers that they would consider him only for a permanent position. The sworn testimony introduced by the Petitioner states that the prospective employer would have given him an immediate position which would have given him a wage rate surpassing the maximum allowable compensation payments, if he had given up his intentions to continue his education (This giving him an even greater earning capacity than if he had discontinued.).

Did the Commission, the Appellate Court, or any of the parties adversely affected seize upon this as an opportunity to say that the Petitioner was unwilling to work. No. This is clear from the statement of the referee that he believes the employee may have had the ability and willingness to work, but lacked opportunity. Then as regards the second factor in the definition of

opportunity to work, the Petitioner had job openings available to him.

In the written opinion of the Court, affirming the fantastic low award of the Commission, it is stated: "This lack of opportunity to work is reflected by the following excerpt from the petition herein: 'After leaving school of Feb. 18, 1953, the applicant could not immediately find a position which would carry him through to September 1953, at which time he was to return to school, so he took odd jobs until he could find a position at which he could work until September. Prospective employers would not consider him for permanent positions because he was returning to school in the fall.'" In the light of the facts and arguments set forth in the preceding paragraphs, it is clear that this statement has been torn out of its context to make it mean that the Petitioner lacked opportunity to work in the same manner in which West lacked opportunity to work, but it is clear that this is not the case.

The excerpt from the written opinion of the Court gives a false impression of the ability and earning capacity. This statement must be read in the light of its historical setting:

Briefly, the Petitioner registered at the University of California in the fall of 1949. Before that, he was employed steadily and full-time for a period of two years. He always worked steadily and full-time during vacations. Immediately upon leaving school for summer vacations, the Petitioner always took a full-time job at which he worked until the day he returned to school at the termination of each vacation. And further, for at least two years before the injury, the Petitioner was receiving wages which would have allowed his compensation to be computed at maximum. It is obvious then that there was very difinitely a continuity, as the transition from work to school and school was always without any time lost.

It so happened that on February 18, 1953, your Petitioner left school. His religious training and scruples did not allow him to lie to prospective employers about availability for permanent positions, so it took longer to find a suitable position, and consequently your Petitioner lost time from work. This period of unemployment came at such a time, that when the Petitioner's average earnings were computed, that the Accident Commission for some reason considered a period of 170 days which included all of the time of unemployment. The Commission took into consideration only this period of time in computing compensation payments as indicated by the referee in his report: "....In other words, for the period beginning February 1, through July 20, 1953, the date that he went back to work, a period of 170 days, the employee earned $848.58 or an average of $35 a week. The actual weekly wage of $36.84 gives rise to a compensation rate of $22.75 a week...." It shall later be shown that the period of time involved is inaccurate and that the amount of actual earnings is not right, in that they were higher. It is thus evident that the Commission took into consideration only the Petitioner's earning history, and that within a period of time so as to give him the very lowest compensation allowable. In the case of Colonial Mut. Ins. v. IAC, 47 Cal. App. 2d 487, it is stated: "Although in determining average weekly earning capacity at the time of an injury, due consideration may be given to earnings in the past, such earnings are not the controlling factor in determining earning capacity."

The Court in its written opinion (attached hereto)

states: "....that it is not fair or reasonable to ignore the element of discontinuity in an intermittent workman's employment, an award in such a case is sustainable 'only if computed correctly under (d), the earning capacity subdivision' (p724); that earning capacity under that subdivision 'cannot properly be determined by reference to the rate of pay alone. . .Fundamentally, earning capacity is total earnings measured against the period of time within which those earnings were made. Whether the earning capacity rate is identical with the pay rate depends upon the steadiness of employment. Thus, the particular wage rate an employee is receiving at the moment of injury may or may not be indicative of his actual earning capacity at that time' (p.725); and that 'earning history must be considered in arriving at earning capacity, and more often than not, it will be determinative.' p.725.)" It shall later be shown that Petitioner's earnings were measured against a greater period of time than in which the earnings were made. While it is true that earning factors must be given consideration, they cannot according to subdivision (d) be the only factor. In this case, earning history was the sole factor given consideration, as shown by the fact that the Commission considered <u>all</u> the time of unemployment, with <u>no</u> reference to the rate of pay (This period of time including both employment and unemployment is the alleged 170 days previously referred to.). Furthermore, the Petitioner was earning wages which would have given him maximum compensation during all times of employment.

The reference made states that earnings history more often than not will be the determining factor. Subdivision (d) states that surrounding circumstances must be taken into consideration. So according to the West case there are conceiveably circumstances in which earning history will not be the determining factor, and subdivision states that these must be taken into consideration. While it is obvious from the foregoing that the Petitioner's earning capacity should be set at over $70 per week, which he was making at the time of injury and also during previous summers, the Commission did not take these facts into consideration when computing compensation, nor the Court in affirming the award.

The fact that there are circumstances in which earning history will not be the determining factor leaves room for interpretation on the part of subdivision (d) of section 4453 of the Labor Code, and considerable doubt on the part of the West case as to whether or not the Commission and Court were right in their interpretation of the law in my case, and whether or not they were right in even applying the principles set forth in the West case to the Petitioner's case, interpreting both in the narrowest sense. Whereas, the State Constitution provides that the compensation law is to be interpreted liberally so as to extend its benefits. In the case of Rideaux v. Torgrimson, 12 C. 2d 633, 1939, it was stated that doubts must be resolved in favor of the employee. And in the case of Bianco v. IAC, 24 C. 2d 584, 1944, it was decided that where there are two constructions possible, the more liberal of the two is to be applied in favor of the employee.

With this background, let us again return to the excerpt on page 3, line 3 through line 7 (in mimeographed copies allow two lines for every number, e.g. line 7 on original, because only every other line is numbered, is line 14 on mimeographed copies as these lines are not numbered) which states that the lack of opportunity to work is reflected by the statement of the Petitioner that he wanted to continue his schooling. It seems rather odd that one can take himself off the labor market by a statement that one wants to continue school. In this case the statement

of the employee that he could not immediately obtain a position is not an unqualified statement of lack of opportunity to work. It is a statement of a condition beset with circumstances which have not been considered in making the award so low because of the alleged lack of opportunity to work. That surrounding circumstances being that for severl years there has been an uninterrupted continuity in the Petitioner's employment. Then after this long period of continuity, there is a period which the Commission alleges to be 170 days (as will later be shown, even this period must be shortened to at least 151 days), in which there is a short period of unemployment which if taken by itself entirely distorts the Petitioner's earning capacity. Shall the religious scruples, of the Petitioner which did not allow him to lie to prospective employers about permanent availability, not be taken as some of the surrounding circumstances which must be considered according to subdivision (d)?

Even an engineer upon graduation, not intending to continue his education further needs some time after leaving school to find a suitable position. Now had this engineer after a short time of unemployment, then worked for the same period of time as the Petitioner, and received pay which would have allowed his compensation to be computed at maximum, been injured, his compensation would have been computed at maximum. Can the Court justify the consideration of surrounding circumstances in this hypothetical engineer's case and not in the Petitioner's? Is this not discriminatory?

The Appellate Court speaking of the principles of the West case which have been thus far discussed, says in its written opinion on the Petitioner's case: "These principles were reaffirmed in a temporary employment case in Campbell v. Industrial Acc. Comm, 95 Cal. App. 2d 570, which distinguished California, etc. Ins. Co. v. Industrial Acc. Com., 86 Cal. App. 2d 861, as one in which it appeared that, although the employee worked intermittently in 1946, 'in 1947 he was in excellent health, worked regularly and steadily and the court distinguished the case from that of the West case . . . for these reasons.' (p. 576 of 95 Cal. App. 2d.)"

Let us for a moment compare the Cal. etc. Ins. Co. case just referred to, to that of the Petitioner. In this case it was decided that the Commission did not abuse its powers in an award involving a death benefit. The employee was in poor health through 1946, however in 1947 he was in excellent health. He was intermittently employed in 1946. In 1947 he was employed at $2 per hour on a job estimated to take only five or six days. It was on this job where he received injuries resulting in his death. "The only evidence as to his 1947 earnings was that he was paid $2 per hour while working on the job where he was killed." (p. 861, of 86 Cal. App. 2d.)

On the other hand, your Petitioner had been in excellent health even more than a year prior to his injury as is shown by the uninterrupted continuity for several years prior to his injury. He was earning over $70 per week at the time of his injury, and had also been making over $70 per week for over two summers precedin his injury. He never worked intermittently except for a short period during the alleged 170 days in question. Even while attending classes, the Petitioner worked at least one day and sometimes more per week. These were jobs lasting the whole day, that is at least 8 hours and many times longer than 8 hours. The wages were never less than $1.25 per hour plus carfare, and also lunch was many times included. Many of these jobs were at the

rate of $1.40 per hour plus carfare. It is obvious if a student is able to make these wages working only part-time, his abilities are far above that in full-time employment. Is this not a much more clear-cut case than the Cal. etc. Ins. Co. case? If the court distinguished that case from the West case, should not this case have been much more so? Is the Workman's Compensation law made for only those who well established, working for a long time and can afford to be injured? The Petitioner in this case, before the injury was clearly and undisputedly capable of making over $70 per week, because he was doing so for at least two summers, and also at the time of his injury. After his injury, the Petitioner received a 100 per cent disability rating for he has no sight in one eye, and how has only 20/200 in the other due to the injury. If this condition were only temporary, the Petitioner would not make such an issue of the point, but his disability is now 100 per cent and he will never again have the opportunities which once were open to him. Should not the Compensation law be given at least a slightly liberal construction in accordance with the Constitution, where the disability is permanent and 100 per cent, instead of giving it the harshest possible construction?

What about the case of Campbell v. IAC, 95 Cal. App. 2d 570, referred to by the Appellate Court as being distinguished from the Cal. etc. Ins. Co. case (previously cited)? The employee in this case was 75 years of age. One and one half years prior to his injury, he applied for and received pension, and is still receiving it at the time of his injury. From reading over the case it appears that he was not regularly working and had no intention of doing so. It appears that he was only helping out a rancher who had previously been good to him. He was apparently helping out because of scarcity of irrigators, the rancher agreeing to remunerate him for his work.

In the petitioner's case however, there was a continuity in employment, with an intention to work both during the period of time in question and also thereafter. Your Petitioner's livelihood was dependent upon and derived from the sources of his employment which was not so in the Campbell case.

In conclusion, with reference to the West case, and other related cases cited, your Petitioner cannot be said to have lacked opportunity to work in any meaningful sense which would have disqualified him from consideration of his claims of maximum compensation; His ability and willingness are not questioned. His employment was characterized by a definite continuity: He was in good health; His earning capacity was increasing; His earnings were consistently over $70 per week; His earning capacity was over $70 per week; And if his earning history had been given consideration, it would have shown his ability and capacity to earn over $70 per week because he was consistently doing so; His case must therefore be distinguished from the West and Campbell cases.

Subdivisions (a) (c) and (d) of Section 4453 of the Labor Code read thus:

"(a) Where the employment is for 30 or more hours a week and for five or more working days a week, the average weekly earnings shall be 95 percent of the number of working days a week times the daily earnings at the time of the injury.

(c) If the earnings are at an irregular rate, such as piecework, or on a commission basis, or are specified to be by the week, month, or other period, then the average weekly earnings mentioned in subdivision (a) above shall be taken at 95 percent of the actual weekly earnings averaged for such period of time, not exceeding one year, as may conveniently be taken to determine an average weekly rate of pay.

(d) Where the employment is for less than 30 hours per week, or where for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied, the average weekly earnings shall be taken at 95 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his injury, due consideration being given to his actual earnings from all sources and employments."

At the time of the injury, your Petitioner was working for more than 30 hours a week, and for five or more days a week, in compliance (a). He left work because of his injury on July 20, 1953, while making over $70 a week. He started on this job May 19, 1953. There was a definite and clear continuity in the Petitioner's employment, as also there had been for a number of years preceding his injury. This continuity existed except for that very short period just following the time that he left college. Thus it is clearly evident, that in the Petitioner's case, only those circumstances were taken into consideration, and the facts so colored, so that only the most negative factors were taken into consideration when his compensation was computed.

Now it would also certainly have been possible to compute your Petitioner's compensation at maximum under (d). The essential difference in computation from that of (a) is that in this case the wages are to be divided by a convenient period of time not to exceed one year. Most certainly a convenient period of time does not mean an arbitrary period of time. A convenient period of time also does not mean a selected period of time that would make an employee's earning capacity appear unreasonably and ridiculously low. It is then clear that this period of time should be such a period as will reasonably represent the employee's earning capacity.

If, under other subdivisions, which are less liberal than (d), the Petitioner's compensation could have been computed at maximum, then certainly under this subdivision it could have been done. The Petitioner had been making over $70 per week for a long time prior to his injury, and was consistently doing so. Then it happened that after he left school there was a short period of unemployment for the first time in many years. If the Commission then takes a relatively short period of time (allegedly 170 days) which includes that whole period of unemployment (the first in many years), and says that this reasonably represents the Petitioner's earning capacity, that the intent and purpose of (d) has been flagrantly violated, as it states: "....the average weekly earnings shall be taken at 85 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his injury. Can the last sentence of (d) be taken to mean that only the employer, and not the employee, is to be given "due consideration?" Is this clause not there primarily for the benefit of the employee? Should it not at least be construed to mean that if the employer is to be given due consideration, the employee must likewise be extended this same advantage?

The very nature of this case makes it clear that your Petitioner has been dealt with in an arbitrary and discriminatory manner; His earning capacity was computed at the lowest rate possible; His earning history which showed his true average weekly earning capacity was entirely ignored; That the Labor Code was therefore improperly construed and applied.

Besides the interpretations which have been given the meaning of average weekly earning capacity in your Petitioner's case, what is the basic meaning of earning capacity? In the case of Texas Electric Ry. v. Worthy, (Tex. Civ. App.) 250 S. W. 710, 712, it is stated: "Earning capacity does not necessarily mean the actual earnings that one who suffers an injury was making at the time the injuries were sustained. It refers to that which, by virtue of the training, the experience, and the business acumen possessed, an individual is capable of earning." In the case of Colonial Mut. Comp. Inc. Co. v. IAC, 47 Cal. App. 2d 487, It is stated: "Capacity to earn money necessarily means all the surrounding circumstances and conditions disclosed by the evidence which may indicate one's usual and ordinary ability to earn wages, including his physical ability, his natural talents, his training, his opportunity to secure employment and the condition of his health." Your Petitioner does not even claim that his earning capacity must be taken at more than that amount which he was regularly earning. He is saying that his earning capacity as at least equal to the amount which he was earning at the time of his injury, and also before that.

In the case of Howell v. IAC, 47 Cal. App. 2d 326, due to weather conditions a man was only ble to work eight m nths out of the year. In this case, the Commission could take total yearly earnings and divide them by eight.

In what way did the Commission improperly compute your Petitioner's compensation? The following is a statement of how these computations were made, taken from a report of the referee, March 21, 1955. This is the report dated just four days before the issuing of the award. The Findings and Award are dated March 25, 1955. The underlining is ming: "Earnings. It seems to me that the earnings of this employee should be based upon the average sum of $35 weekly or an actual of $36.84 weekly. I believe that Section 4453 (d) is applicable herein. I have taken the various periods of employment since the employee left college in February, added them together and divided the same by the total number of days involved. Applicant testified that he earned from $70 to $80 in February. I am taking $75 as the amount. From April 11 through May 9, he earned $127.40. For the period beginning June 10 through July 20, a period of 6 weeks, applicant earned $73.85 a week. I state that because his earnings were $60 and his board and lodging amounted to $13.85 a week, the same being provided by the employer. The total sum is $443.10 for that period. There is then another period of May 19, 1953, through June 9, 1953, during which the employee received $8 a day, 6 days a week and his meals worth $13.85 or $61.85. For that period of 3-1/7 weeks the amount is $203.08. In other words, for the period beginning February 1, through July 20, 1953, the date he went back to work, a period of 170 days, the employee earned $848.58 or an average of $35 a week. The actual weekly wage of $36.84 gives rise to a compensation rate of $22.75 a week which I believe is a

fair basis for determining the earning capacity of this employee considering his program of living at the time of the injury."

The underlined statement about adding various period of employment together is in and by itself not an explanation of what the referee did in computing the Petitioner's earning capacity, not if he came out with an average wage of $36.84.which was the case. He has listed the various periods of employment involved. Let us add them together and see what the average wage should have been.

FROM	TO	DAYS IN PERIOD	AMOUNT EARNED IN PERIOD
Feb. 1	Feb. 28	28	$ 75.
April 11	May 9	28	$127.40
June 10	July 20	40*	$443.10
May 19	June 9	22*	$203.08
		118	$848.58

*These two periods are actually one period in which there was no break in employment, nor change in employer. Breaking these up, makes it appear as if the Petitioner was continually changing employment.

Accordingly, adding these periods of time together, the referee should have arrived at the following: dividing 118 into $848.58 gives a daily wage of $7.20, and multiplying this by 7, gives a weekly wage of $50.40. This period also covers days of unemployment, and furthermore, the Petitioner never worked for such low wages. He has consistently been earning over $70 per week. Thus, it cannot be said that Petitioner's earning history is not taken into consideration if this method is used.

However, the Petitioner actually left school on Feb. 18, instead of Feb. 1, as stated by the Commission. As evidence thereof, the Petitioner has attached a certified photostatic copy of his transcript from the University of California. This brings the 170 days down to 152.

Furthermore, the alleged wages of $848.58, earned during this period is incorrect. For the referee stated that the Petitioner's wages at Stokely-Van Camp, between April 11, and May 9, 1953, were 127.40. Your Petitioner however states that this figure should be 140.97. To the original of this Petition is attached a W-2 form showing that the wages received during this period 135.04, and also a check stub dated 2-26-55, this year, and for 5.93, pay retro-active to that period in 1953. Thus, 5.93 added to 135.04, gives 140.97. Adding the correction of 13.57, brings the wages for this period up to 862.15. Let us again make use of the preceding chart using the corrected figures:

FROM	TO	DAYS IN PERIOD	AMOUNT EARNED IN PERIOD
Feb. 18*	Feb. 28	10*	$ 75.
April 11	May 9	28	$140.97*
June 10	July 20	40	$443.10
May 19	June 9	22*	$203.08
		100	$862.15

*Corrected figures. The last two periods are really one continuous period.

Using the corrected figures, 100 days into 862.15 equals 8.62 as a daily wage or 7 X 8.62 which is 60.34 as a weekly wage. This period also covers days of unemployment.

It is also very reasonable that a time of at least two weeks be allowed for vacation after a man finishes his college work. It is also very reasonable that a man be allowed sometime in which to find a suitable position after finishing his college work. Since the referee has considered only that the Petitioner has finished his schooling, and was during the time in question permanently ready for the open labor market, he should have subtracted at least two weeks vacation after leaving school, and allowed three or four weeks time to find a suitable position. Then he could have divided this convenient period of time into his total wages to get his average earnings. Outside of this short period concerned, the referee gave no consideration to the continuity of employment, nor to the consistently high earnings of the Petitioner which were over $70 per week.

The referee at the hearing made no attempt to find out what the referee was doing during the time which the Petitioner was supposed to be unemployed; when as a matter of fact he did go home for part of this time, did some work gratus at home, and also received his board and lodging for this period.

Undisputedly then, the referee used as a basis for his computations figures for which he had absolutely no evidence; his computations were erroneous; he gave no consideration to surrounding circumstances; and he gave consideration only to those circumstances which he thought would allow him to compute the Petitioner's average earnings at a ridiculously low rate of $36.84 weekly.

According to the West case, previously cited, the findings of the Commission may be set aside if contrary to evidence.

The Appellate Court in its opinion stated: "Moreover, the referee apparently did not use the full 170 days in making his computation. Had he done so he would, according to our computation, have obtained a smaller sum than $36.84 as the actual weekly wage rate." How the referee arrived at this figure, we do not know. In any case it makes very little difference, because it would only mean an allowance of 10 days, more or less. Whereas the actual error in time was 18/152, or 11.88%, as against his 10/170, or just over 5%. Besides this, the referee also took Petitioner's wages at a figure lower than they actually were. We can assume that the referee actually intended to take "the various period of employment since the employee left college in February, added them together...." and use them for that "convenient" period of time by which to divide his earnings, and so to arrive at an average weekly rate. This therefore makes the position of the Commission even further untenable.

According to the case of West v. IAC, 79 Cal. App. 2d 711, 1947, the findings of the Commission may be set aside if the findings are contrary to evidence (p. 718). It is also stated that: "The Industrial Accident Commission is a court deliberately clothed by the Legislature with administrative facilities to permit it to develop the facts in matters not known to laymen. It may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence." (p. 712)

The Petitioner, has attached to the original copy of this Petition, definite evidence showing that the referee did not use the right number of days, nor the correct amount of money in computing Petitioner's earnings. For this reason alone, it is mandatory that the case be referred back to the Commission for taking of additional evidence.

From the opinion of the Appellate Court: "As to the asserted errors in computation, petitioner says, first, that the period of his availability for work was 151, not 170 days; i.e., that he graduated from the univer ity on the 18th of February, 1953, hence it was error for the referee to take the 1st of February as the beginning date. However, we find in the record no evidence of the precise date of graduation. Petitioner testified that he finished his schooling 'in' February. In view of that, we do not consider he is in a position to complain of the referee's taking the 1st of February for computation purposes." (According to the chart which gives the number of days between dates, i.e., between Feb. 18, and July 20, the exact number of days is 152 rather than 151; thus the Petitioner is using that figure in this Petition.)

As to the error regarding the error in total earnings over this period, the Appellate Court says, "Petitioner states that the referee mistakenly used the sum of $127.40 instead of $135.04, plus $5.93 of retroactive pay, for his receipts as a cannery worker during April 11 to May 9, 1953. In his Petition he says that 'W-2 form issued by the company to the applicant shows that the earnings for that period' were in the higher amount. However, the transcript of his testimony at the hearing before the referee indicates that he twice stated that the correct sum for that period was $127.40."

When your Petitioner was advised of the date of his hearing before the referee, he was advised to bring with him the information with regard to his earnings and amount of time worked. In compliance, the Petitioner supplied the information that he was working on the job where he was injured for over two months, and earning over maximum during this whole time (add last two periods of the second table on p. 9 for exact figures). Having supplied this information, the Petitioner had no idea that other information could in any possible way be pertinant, so he did not even think to suggest anything else with regard to the importance of other information.

However, when the Petitioner appeared at the hearing, the referee asked him for a vast amount of minute and detailed information not having to do with the time and amount of earnings on the job where he was injured. How could the Petitioner be expected to testify unexpectedly as to the exact date of leaving school? How could he be expected to testify as to exact amounts of money which were not earned on the job where he was injured?

As to the amount of money earned at the cannery, the attorney for State Compensation offered that information. The Appellate Court says that the Petitioner twice testified that the lower amount was correct. However, when the insurance carrier twice offered the lower amount as correct (the Petitioner having long ago forgotten the amount and therefore did not know), the Petitioner assumed that it was correct and gave his assent on that basis. The Petitioner at no time during the hearing stated any amount earned at the cannery, but only assented on the basis of an assumption of its correctness as it was read to him. How could the Petitioner be expected to testify with respect to this other

and additional information?

If all this additional information was to be used in computation, the Petitioner should have been so advised before his hearing so as to give him a chance to gather it. If the referee had intended to use this additional in a manner of which the Petitioner was not aware, he should have at least been told at the hearing that it was extremely important that he testify exactly as to times and amounts nor having to do with the job on which he was injured. These then not being available, it should have been stipulated that computation whould not begin until the additional authentic information regarding dates and amounts was submitted to the Commission. Imagine the surprise of the Petitioner when, upon the issuing of the Findings and Award by the Commission, the referee had used unsubstantiated assumptions in his computation, not to mention the fact that the average earnings were erroneously and illegally computed.

It is therefore clearly evident from the foregoing, that the Petitioner was refused the right to present his case; that he was deprived of a fair hearing; that he was refused the right of presenting evidence substantiating his claims; and that he was denied that which was rightfully his without due process of law.

The Petitioner also questions the right of the Industrial Accident Commission of the State of California, or a panel thereof, or the referees of this Commission to assume the position of a trial court, de facto or de jure, without any provisions for a jury system under any circumstances.

Furthermore, the Petitioner was not really given a fair or equal chance to present his arguments before the Appellate Court. The Petitioner makes this statement only from inference, because he was not refused the right to argue his case in actuality.

When the Petitioner appeared before the Court, he took the stand, but because he was not familiar with court proceedings or method of argumentation in such cases, it was suggested to him by one of the justices that he let the attorney for the respondent Accident Commission argue first. The justices questioned him carefully regarding the reasons of the Commission for making the decision they did. The Petitioner was then asked if he had anything to say. After the Petitioner had finished about four or five sentences in the statement of his case, one of the justices said, "We understand your position," inferring that there was no further need for argument. The Petitioner was not asked any question regarding the reasons for his position. If the justices had any questions regarding the reasons for Petitioner's position (which they obviously did, because the decision was in all points adverse to Petitioner), they might have at least so indicated by giving him a chance to answer them, and so at least correcting some of the possibly naive suppositions. Besides this, the Petitioner believes that he would have been able to compitently handle such a situation. But as it was, how was he to know just what part of his case needed strengthening? The attorney for the respondent Accident Commission, however, knew just what part of his case needed strengthening because he had the questions of the justices to guide him.

The Court should have recogn zed that the Commission's findings were not supported by evidence, and that the Commission did not further inquire into matters which required more extensive investigation. The Commission and the Courts are duty bound

to give the employee every consideration, not to mention the fact that they are duty bound to annul and rectify illegal actions.

WHEREFORE, your Petitioner prays:

1. That this Court, at a specified time and place, hear his case against the Industrial Accident Commission, that the lawfulness of the same may be inquired into and determined by this Court, as provided by law.

2. That said matters be fully heard and considered by this Court and that it be ordered, adjudged and decreed that said Order of the Appellate Court affirming the Findings and Award made by said Respondent Industrial Accident Commission, be annulled, vacated and set aside in order that the Award may be raised and computed in a correct and legal manner.

3. That your Petitioner may be granted such other and further relief as may be proper and just in the premises.

_____
Petitioner

STATE OF CALIFORNIA)
) ss
COUNTY OF_____)

_____, being duly sworn, deposes and says:

That he is the Petitioner in the above-entitled matter; that he has read the foregoing Petition and knows the contents thereof; that the same is true of his own knowledge except as to matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

_____
Petitioner

Subscribed and affirmed before
me this_____
day of_____, 19_____

_____
Notary Public in and for the
Country of_____State of_
_____

MAR 2 1 1956

HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 591 MISC.

ERNEST M. FRIESEN, *Petitioner,*

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, BERKELEY YOUNG MEN'S CHRISTIAN ASSOCIATION, STATE COMPENSATION INSURANCE FUND, and STATE OF CALIFORNIA (SUBSEQUENT INJURIES FUND), *Respondents.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1955

No. 391

ERNEST M. FRIESEN, *Petitioner,*

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, BERKELEY YOUNG MEN'S CHRISTIAN ASSOCIATION, STATE COMPENSATION INSURANCE FUND, and STATE OF CALIFORNIA (SUBSEQUENT INJURIES FUND), *Respondents.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent Industrial Accident Commission hereby respectfully submits is brief in opposition to the petition for writ of certiorari filed by petitioner, Ernest M. Friesen.

Petitioner seeks to review a decision of an intermediate appellate court of the State of California, which affirmed an award of the Industrial Accident Commission. Petitioner's dissatisfaction with the

commission's order and the court's decision affirming it is based on the contention that the order should have provided benefits at a higher rate than that which was awarded. Petitioner's request for a hearing in the California Supreme Court was denied.

STATEMENT OF THE CASE

Petitioner was found to have sustained an industrial disability from a detached retina July 2, 1953.

A few months prior to the injury he had been attending school. He discontinued school in February, 1953, and worked at odd jobs earning about $70 or $80. He worked in April and early May at Stokely-Van Camp Inc., earnings for week ending April 11, 1953—$11.73; April 18—$21.35; April 25—$42.35; May 2—$39.20; May 9—$12.77.

In the work at which he was injured, he started on May 19, 1953, and worked 19½ days, through June 9, 1953, at $8 a day, six days a week. He was then raised to $60 a week with board and lodging worth $60 a month.

At the time of the hearing applicant was a student in a theological school in Berkeley.

The commission computed petitioner's weekly benefit for temporary disability at $22.75.

Petitioner's contention is, and has been, that it should have been computed at the maximum rate of $35.

JURISDICTION

It is respondent's position that the Honorable Supreme Court of the United States has no jurisdiction over this case.

The amount of money to be paid an injured employee under a state workmen's compensation act is completely a matter of state jurisdiction. The minimum and maximum amounts to be paid, and the methods of computing them, are necessarily arbitrary and they differ from state to state.

See Workmen's Compensation Law (Larson 1952) Volume 1, page 11, and Volume 2, Appendix, pages 532 to 534.

Petitioner does not expressly state the grounds on which he believes that the United States Supreme Court has jurisdiction.

Assuming that he is contending that his rights under the Federal Constitution have been violated, it should be remarked that this contention was never expressly made before any of the state tribunals.

There would appear to be no federal question involved.

Stadelman v. *Miner* (1918), 246 U. S. 544, 38 Supreme Ct. 359;

Ireland v. *Woods* (1918), 246 U. S. 323, 38 Supreme Ct. 319.

ARGUMENT

PETITIONER'S WEEKLY BENEFIT WAS NOT IMPROPERLY COMPUTED

The amount of the weekly benefits to be paid under the California Workmen's Compensation Law depends on average weekly earnings and average weekly earning capacity.

California Labor Code, Section 4453.

The determination of average weekly earnings and average weekly earning capacity is the determination of a question of fact. Unless there is an abuse of discretion, such a determination by a state commission should not be disturbed by the courts.

Aetna v. *Ind. Acc. Com.* (1933), 130 Cal. App. 488, 493.

In making a determination as to average earning capacity under the California Workmen's Compensation Law, consideration must begiven to the earning history of the disabled employee

West v. *Ind. Acc. Com.* (1937), 79 Cal. App. 2d 711, 725;

Accord:

Campbell v. *Ind. Acc. Com.*(1950), 95 Cal. App. 2d 570.

Perhaps the best statement of the case and the issue involved is contained in the opinion of the California Appellate Court. It is therefore set forth in full in Exhibit A, attached hereto.

It is respectfully submitted that the question raised by the petition is not one within the jurisdiction of the United States Supreme Court, that it involves merely the determination of a factual question under the state statute, and that the question was not improperly determined.

The petition for writ of certiorari should therefore be denied.

Dated, San Francisco, California.
March ---, 1956.

Respectfully submitted,

EVERETT A. CORTEN
Attorney for Respondent
Industrial Accident Commission
of the State of California

DANIEL C. MURPHY,
of Counsel

EXHIBIT "A"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

ERNEST M. FRIESEN,

Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, BERKELEY YOUNG MEN'S CHRISTIAN ASSOCIATION, STATE COMPENSATION INSURANCE FUND, and STATE OF CALIFORNIA (SUBSEQUENT INJURIES FUND),

Respondents.

1st Civil No. 16,789
OPINION (Filed Nov. 10, 1955)
136 Advance California Reports, p. 971.

The petitioning employee questions the correctness of the respondent commission's award to him of temporary total disability compensation in the amount of $22.75 a week based upon a finding that the sum of $36.84 reasonably represents his average weekly earnings at the time of the injury. He claims a higher average earning rate, one which would entitle him to the maximum rate allowed by Section 4453 of the Labor Code.

Specifically, the petitioner claims that in ascertaining his average weekly earnings the commission (1) should have used the formula prescribed by subdivision (a) instead of the method prescribed by subdivision (d) of section 4453 of the Labor Code; (2) incorrectly applied the method prescribed by

subdivision (d); and (3) committed errors of computation in making the determination.

Petitioner had been a student at the University of California. Upon his graduation in February of 1953, he sought temporary work with the intention of taking up graduate studies in the fall of that year.

According to the referee's report upon which the commission's findings and award were based, there was evidence that petitioner earned from $70 to $80 in February, 1953; $127.40 from April 11th through May 9th; $61.85 a week, May 19th through June 9th; $73.85 a week, June 10th through July 20th; summarized by the referee as follows: "In other words, for the period beginning February 1, through July 20, 1953 . . . a period of 170 days, the employee earned $848.58 or an average of $35 * a week. The actual weekly wage of $36.84 * gives rise to a compensation rate of $22.75 * a week which I believe is a fair basis for determining the earning capacity of this employee considering his program of living at the time of the injury," adding that he deemed subdivision (d) of section 4453 applicable.

The referee later (in his report recommending denial of petition for reconsideration) amplified this statement: ". . . the employee contends that his earnings were maximum. He points out that at the time of the injury, he was still acquiring an education and was in college. Though he was graduated, he had continued his education and had obtained such jobs that he could while attending classes. He was injured while actually earning maximum wages but the record was clear that this was a temporary job during vacation.

* $22.75 represents 65% of the average weekly earnings of $35 (§ 4453, Lab. Code), which latter represents 95% of the average weekly earning capacity of $36.84 (§ 4453, subd. d).

As pointed out in the Report of Referee, I have taken various periods of employment since the employee left college in February, added them together and divided the same by the total number of days involved. In other words, his earnings over a period of time prior to the injury were averaged up.

"I believe that though the employee may have had the capacity to earn more money and also the willingness to earn more money, he lacked the opportunity to do so by taking himself, in effect, off the regular labor market. I think that the West case, 12 CCC 86, is applicable here."*

The "West Case" is West v. Industrial Acc. Com., 79 Cal. App. 2d 711; hearing by Supreme Court denied, p. 727. It holds that "earning capacity at the time of injury is the touchstone of average earnings in California" (p. 722), that earning capacity is composed of three factors: "(1) ability to work; (2) willingness to work; and (3) opportunity to work" (p. 722); that it is not fair or reasonable to ignore the element of discontinuity in an intermittent workman's employment, an award in such a case is sustainable "only if computed correctly under (d), the earning capacity subdivision" (p. 724); that earning capacity under that subdivision "cannot properly be determined by reference to the rate of pay alone . . . Fundamentally, earning capacity is total earnings measured against the period of time within which those earnings were made. Whether the earning capacity rate is identical with the pay rate depends

* This lack of opportunity to work is reflected by the following excerpt from the petition herein:

"After leaving school on Feb. 18, 1953, the applicant could not immediately find a position which would carry him through to September 1953, at which time he was to return to school, so he took odd jobs until he could find a position at which he could work until September. Prospective employers would not consider him for permanent positions because he was returning to school in the fall."

upon the steadiness of employment. Thus, the particular wage rate an employee is receiving at the moment of injury may or may not be indicative of his actual earning capacity at that time" (p. 725); and that "earning history must be considered in arriving at earning capacity, and more often than not, it will be determinative." (P. 725.)

These principles were reaffirmed in a temporary employment case in Campbell v. Industrial Acc. Com., 95 Cal. App. 2d 570, which distinguished California, etc. Ins. Co. v. Industrial Acc. Com., 86 Cal. App. 2d 861, as one in which it appeared that, although the employee worked intermittently in 1946, "in 1947 he was in excellent health, worked regularly and steadily and the court distinguished the case from that of the West case . . . for these reasons." (P. 576 of 95 Cal. App. 2d.)

In view of these precedents and the logic of the situation, we are persuaded that subdivision (d) of section 4453 governs in our case and was correctly applied.

As to the asserted errors in computation, petitioner says, first, that the period of his availability for work was 151, not 170 days; i.e., that he graduated from the university on the 18th of February, 1953, hence it was error for the referee to take the 1st of February as the beginning date. However, we find in the record no evidence of the precise date of graduation. Petitioner testified that he finished his schooling "in" February. In view of that, we do not consider he is in a position to complain of the referee's taking the 1st of February for computation purposes. Moreover, the referee apparently did not use the full 170 days in making his computation. Had he done so he would,

according to our computation, have obtained a smaller sum than $36.84 as the actual weekly wage rate.

Petitioner states that the referee mistakenly used the sum of $127.40 instead of $135.04, plus $5.93 of retroactive pay, for his receipts as a cannery worker during April 11 to May 9, 1953. In his petition he says that "the W-2 form issued by the company to the applicant shows that the earnings for that period" were in the higher amount. However, the transcript of his testimony at the hearing before the referee indicates that he twice stated that the correct sum for that period was $127.40.

In respect to the period May 19th through June 9th during which petitioner worked at the rate of $8 per day, the referee computed the total upon the basis of a week of six working days. Petitioner says he worked seven days per week. While it is true that in one part of his testimony he said he was receiving $8 per day seven days a week during that period, at another point he testified that he worked 19½ days during that period. The latter quite clearly tends to support the inference of a week of six working days. In any case, the referee gave the petitioner full credit for the $156.00 which 19½ days would produce.

Finally, petitioner claims that the referee should have credited him with $14.00 a week as the value of board and room, which the evidence shows was considered worth $60.00 a month. The referee in converting the monthly into a weekly rate of pay took $13.85 a week as the equivalent of $60.00 a month. In view of the varying number of days in a month the referee's computation in this regard appears to us more precise and accurate than that of the petitioner.

In conclusion, we find no basis for disturbing the findings and award made by the commission. The award is affirmed.

FRED B. WOOD, J

WE CONCUR:
PETERS, P.J.
BRAY, J.

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